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No. 80-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,
Petitioner,

v.

LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY MEMORANDUM

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A. Two actions of this Court on June 15, 1981 reinforce our submission that the decision below, which rests on a novel application of *National League of Cities v. Usery*, 426 U.S. 833 (*National League*), merits plenary review by this Court.

1. In *Hodel v. Virginia Surface Mining and Reclamation Association* (Nos. 79-1538 and 79-1596), —— U.S. —— ("*Virginia Surface*") and a companion case, *Hodel v. Indiana* (No. 80-231), —— U.S. —— (*Indiana*) the Court sustained the Surface Mining and Reclamation Control Act of 1977 against challenges based on the rationale of *National League*. (*Virginia Surface*, slip op., pp. 17-25; *Indiana*, slip op., pp. 13-14). In so doing, the Court placed the following authoritative gloss on *National League*:

> It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each*

> of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.* at 852. When the Surface Mining Act is examined in light of these principles, it is clear that appellees' Tenth Amendment challenge must fail because the first of the three requirements is not satisfied. The District Court's holding to the contrary rests on an unwarranted extension of the decision in *National League of Cities.* [*Virginia Surface*, slip op., p. 21.]

The Court of Appeals' reading of *National League* is incompatible with each of these three test points. First, as pointed out in our petition (at p. 16), the Railway Labor Act does not purport to regulate "States as States," but rather is directed to the regulation of interstate railroads as railroads. Second, the decision below contravenes the requirement that the matters which Congress seeks to regulate in the challenged statute (in this case, the RLA) must be "indisputably 'attributes of state sovereignty' "; on the contrary, under the Court of Appeals' analysis the scope of state activities which would be exempt from federal regulation is one which constantly changes with circumstances (Pet. App. p. 16a), characterized by that court itself as a "fluid concept of sovereignty" (*id.*, p. 22a). Indeed, the Court of Appeals appears to have merged what are stated in *Virginia Surface* to be separate through interrelated requirements by treating "functions essential to separate and independent existence," "integral governmental functions," and "traditional governmental functions." (Pet. App. 13a) as a single concept, which in that court's opinion are "called 'integral governmental functions' " (*ibid.*; see Pet. pp. 12-14). Even if it were not clear from *Virginia Surface* that the court below has misapplied *National League*, the

scope of the second and third requirements raises a question of constitutional law of recurring importance with respect to which Congress and the States as well as the parties to the preesnt and similar potential controversies require the guidance that only this Court can authoritatively give.

2. On June 15, 1981, the Court noted probable jurisdiction in *Federal Energy Regulatory Commission v. Mississippi* (No. 80-1749) to review a lower court's holding that certain provisions of the Public Utilities Regulatory Policies Act of 1978 are unconstitutional under *National League*. We submit that it will aid the Court in elaborating its elucidation of *National League* to grant certiorari in this case and to set the oral argument in these two cases in tandem.

B. Respondents' sole effort to distinguish this case from *California v. Taylor*, 353 U.S. 553, and the other railroad cases relied on at pp. 9-12 of the Petition is that "those cases were concerned with freight railroading" (Brief in Opp., p. 11). None of those cases, nor the *National League* footnote which disavowed overruling them (426 U.S. at 852, n.13), relied on that circumstance (see Pet., p. 12). Respondents admit, though they minimize, the fact that LIRR is also engaged in "freight railroading" (*id.*, pp. 3-4, 12). But quite aside from the controversy between the parties concerning the relative importance of the LIRR's freight business, it is implicit in respondents' argument that the Tenth Amendment makes RLA wholly inapplicable to the LIRR although it is a freight carrier, because of the carrier's passenger service. Nothing in *National League* justifies what is, in effect, a *Shreveport*[1] doctrine in reverse, whereby a party subject to federal regulation is relieved therefrom by the Tenth Amendment because it is also engaged in activity which the Tenth Amendment excludes from Con-

[1] Houston E. & W. Texas Ry. Co. v. United States, 234 U.S. 342.

gressional regulation (see Pet., pp. 10-14). Specifically, respondents have offered no justification whatsoever for denying to the employees involved in the LIRR's freight business the right to strike guaranteed by the RLA, which is expressly recognized in Taylor, 353 U.S. at 566. The assertion at p. 5 of the Brief in Opposition that "RLA coverage had not been conducive to labor peace on the railroad during the fourteen years of state ownership" is nothing more than disagreement with the judgment of Congress, carries no constitutional weight, and is in any event contrary to the facts (see Pet., p. 17). In sum, it is not the function of a court of appeals to overrule or limit this Court's precedents (such as *Taylor*) on the supposed authority of a decision (*National League*) which expressly preserved those precedents.

CONCLUSION

For these reasons and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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